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No. 486

Supreme Court of the United States

October Term, 1945

...INEVITABLE AND AS CHAIRMAN
... MARITIME COMMISSION,

...

...

... OF CERTIORARI TO THE UNITED
... APPEALS FOR THE DISTRICT OF

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 435

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION, ET AL., PETITIONERS

v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Emory S. Land, Chairman of the United States Maritime Commission, Thomas M. Woodward, Chairman of the Price Adjustment Board of the Maritime Commission, and A. G. Rydstrom, John R. Paull, Norman L. Burton, Kenneth F. Clark, Victor B. Gerard, W. E. Van Houton, and E. Stanley Clines, members of said Board, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on June 18, 1945.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R.

51) is unreported. The opinion of the United States Court of Appeals for the District of Columbia (R. 58–68) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1945 (R. 69). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States District Court has jurisdiction to entertain a declaratory judgment action by a steamship company against the Chairman of the Maritime Commission and the Commission's Price Adjustment Board, to establish that certain contracts of the company are not subject to the Renegotiation Act, where the Board has merely notified the company of a renegotiation conference and requested certain information, and where no order has been issued determining that the contracts are subject to the Act, or that excessive profits have been realized thereunder.

2. If so, whether the court should refuse to exercise such jurisdiction, as a matter of discretion.

STATUTE INVOLVED

The relevant portions of the Renegotiation Act are set forth in a separate pamphlet (Appendix C)

filed with this petition, and entitled "The Renegotiation Act."

STATEMENT

On June 27, 1944, respondent, Waterman Steamship Corporation, filed a complaint in the District Court of the United States for the District of Columbia, against the Chairman of the United States Maritime Commission and the members of the Maritime Commission Price Adjustment Board, seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act, and requesting that renegotiation proceedings with respect to such contracts be enjoined (R. 2–48).[1]

[1] Unless otherwise specified, the provisions of the Renegotiation Act referred to in this petition are those in effect immediately prior to enactment of the Revenue Act of 1943 (Pub. L. No. 235, 78th Cong., 2d Sess. (February 25, 1944)). The original Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, April 28, 1942, 56 Stat. 226, and was amended by the Revenue Act of 1942, October 21, 1942, 56 Stat. 798, the Military Appropriation Act, 1944, July 1, 1943, 57 Stat. 347, the Act of July 14, 1943, 57 Stat. 564, and the Revenue Act of 1943, *supra*, the last of which supplied the title "Renegotiation Act." With certain exceptions, particularly with respect to the Tax Court remedy, the amendments in the Revenue Act of 1943 were made effective only with respect to fiscal years ending after June 30, 1943. (See Sec. 701 (d) of the Revenue Act of 1943.) The pertinent provisions of these statutes are collected in Appendix C, separately printed.

The facts as alleged in the complaint, and as shown by the documents referred to therein, may be summarized as follows:

Respondent owns and operates a large fleet of ocean-going merchant vessels. On and after April 25, 1941, respondent entered into a number of charter parties (the "Red Sea Charters") in form with the British Ministry of War Transport, an agency of the British Government, whereby twelve steamships were chartered to the latter for the transportation of war goods from the United States to ports on the Gulf of Aden and the Red Sea (R. 4–6, 18).[2] By agreement between the British and American Governments, the Maritime Commission undertook to make the payments to respondent which the British Ministry of War Transport was required to make under these charters (R. 6–7, 28). The charters were performed by respondent, and the charter hire, with the exception of certain demurrage items, was paid to respondent on or before November 28, 1941 (R. 7, 41).

On November 26, 1943, petitioner John R. Paull, a member of the Maritime Commission Price Adjustment Board, wrote to respondent stating that

[2] The charter parties were approved by the Maritime Commission in accordance with Section 9 of the Shipping Act of 1916 (39 Stat. 730, 46 U. S. C. 808) making unlawful, without the approval of the Commission, the chartering of any vessel owned by a citizen of the United States to any non-citizen.

"renegotiation for your company has been assigned" to the Board, whose function is "to review the profits realized * * * under contracts * * * subject to renegotiation" under the Renegotiation Act and "to arrive at a settlement of the amount of excess profits, if any, realized under the Act by the contractor * * *" (R. 29–30). The letter invited respondent to an initial conference with the Board (set for December 13, 1943, but subject to continuance at respondent's request, R. 30), and requested that at such conference respondent supply certain information relating to its income and expenses during 1941 and 1942, divided between government and commercial business and showing separately operations under the Red Sea Charters (R. 30–31). The letter explained that at the conference, respondent would be free to state reasons, if any, why it was unable to furnish the information requested or why it was not "subject to renegotiation" (R. 31). The letter concluded by saying that it was anticipated that upon the basis of the requested information, "a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act" (R. 32).[3]

[3] The Renegotiation Act authorizes the heads of war agencies, including the Chairman of the Maritime Commission, to determine whether excessive profits have been realized under war contracts and subcontracts and to take steps to eliminate those profits. (Secs. 403 (a) and (c); see Appen-

On December 13, 1943, respondent replied to Mr. Paull, acknowledging that some of its other contracts with government agencies might be subject to renegotiation and suggesting a conference with respect to such contracts, but denying that the Red Sea Charters were subject to the Renegotiation Act, for the following reasons: (a) the charters were not entered into with any "Department" within the meaning of the Act, since they named the British Ministry of War Transport rather than the Maritime Commission; (b) final payment on the charters had been made prior to April 28, 1942 (although it was recognized that certain demurrage claims against the Commission under the charters were still outstanding); and (c) renegotiation was begun more than one year after the close of respondent's fiscal year within which the charter operations were completed (R. 39–42).[4]

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dix C pp. 6, 8–9.) The Chairman of the Maritime Commission has delegated to the Price Adjustment Board of the Commission authority to review profits on war contracts for the purpose of reaching an agreement with the contractor as to the extent to which, if at all, such profits are excessive. In the absence of agreement with the contractor the Board makes a recommendation to the Commission Chairman, who, if he finds that excessive profits have been realized, makes a determination as to their amount and takes steps for their elimination. (See Appendix B, *infra*, pp. 24–26.)

[4] The Act applies only to contracts with war agencies, including the Maritime Commission, on which final payment had not been made prior to April 28, 1942. Renegotiation

On May 23, 1944, petitioner Kenneth F. Clark, counsel for the Board,[5] wrote to respondent's counsel, expressing the opinion that "there was in each case [pertaining to the Red Sea operation] a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable", and suggesting that a conference be held on June 29, 1944 "for the purpose of determining what portion of the profits of these companies is excessive within the meaning of the Act" (R. 8–9, 44). The letter stated that although for "technical reasons" the charters had been made with the British Ministry of War Transport, the Maritime Commission had conducted the negotiations with the vessel owners and had agreed to pay and had paid the charter hire to them; and that this arrangement "was evidenced by correspondence between the Commission and the vessel owner" which resulted in "renegotiable agreement with the Commission" (R. 43–44).

Respondent did not reply to the letter or attend the conference on June 29, 1944, but instead filed

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must be started within "one year after the close of the fiscal year of the contractor * * * within which completion * * * of the contract * * * as determined by the [head of the agency] occurs." (See Appendix C, pp. 11–12, 16–17.)

[5] Mr. Clark was not then a member of the Board. He was later appointed a member, and after this proceeding had reached the court below, he was made a party, upon motion of respondent (R. 53–57).

its complaint on June 27, 1944, praying that petitioners be enjoined from requiring respondent to furnish information, from enforcing the Renegotiation Act with respect to the Red Sea Charters, and from initiating criminal proceedings because of respondent's failure to supply information (R. 13–14). The complaint further prayed for a declaratory judgment that the Red Sea Charters are not subject to renegotiation, and that no information with respect thereto can lawfully be required of respondent (R. 14–15).

Petitioners moved to dismiss the complaint on the grounds that the court had no jurisdiction over the subject matter, that the complaint failed to show any injury to respondent, and that respondent had not exhausted its administrative remedies (R. 50–51). The District Court, pointing out that no administrative order had been issued, dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (R. 51–52).[6] On appeal, the court below reversed, one Judge dissenting, and remanded the case to the District Court "for consideration of the single question" whether the Red Sea Charters were "contracts with a 'Department' within the meaning of § 403 of the Renegotiation Act of 1942." The judgment of reversal permitted the District Court, in its discretion, to

[6] The court also denied respondent's motion for a preliminary injunction (R. 48–51).

maintain the *status quo* pending decision of the jurisdictional question, and to require respondent to file a bond insuring "payment to the United States of any amount ultimately found to be due" (R. 66).[7]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the District Court had jurisdiction in the circumstances of this case to determine by declaratory judgment whether the Red Sea Charters were contracts with a "Department" within the meaning of the Renegotiation Act.

2. In holding that such jurisdiction, if it existed, should be exercised.

3. In holding that the motion to dismiss the complaint admitted that the Red Sea Charters were not subject to the Renegotiation Act.

4. In failing to hold that the action was premature in that respondent had not sustained and was in no imminent danger of sustaining any legal injury.

5. In failing to hold that respondent should have exhausted its administrative remedies before seeking judicial relief.

6. In ruling that the District Court may, by injunction, maintain the *status quo* pending decision of the jurisdictional question.

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[7] As yet, respondent has not sought a temporary injunction in the District Court.

7. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. This case presents a question of considerable importance to the administration of the Renegotiation Act, designed to control excessive profits under Government wartime contracts. The central issue is whether at the very outset of the renegotiation proceeding, before any administrative determination as to excess profits or any final order for their elimination has been made, the district court may intervene to decide that some of the contracts involved are not subject to renegotiation—an issue which Congress entrusted to the administrative authorities.

The court below divided on this question, but the majority answered it in the affirmative, and, we submit, incorrectly. The court thereby has made available to war contractors a means of effectively halting renegotiation proceedings at the threshold for substantial periods of time whenever a question as to coverage is raised, even though that question, if left to administrative disposition, might be decided for the contractor or might become academic through a determination that there were no excess profits. The six additional cases now pending in the District Court for the District of Columbia presenting the very "coverage" question here involved,[8] as

[8] *American Export Lines, Inc.* v. *Land et al.*, Civil No. 29802; *California Eastern Line, Inc.* v. *Land et al.*, Civil No. 29936; *Isthmian Steamship Co., Inc.* v. *Land et al.*, Civil No. 29546; *Pacific Atlantic Steamboat Co.* v. *Land et al.*, Civil

well as the large percentage of contested renegotiation proceedings in which this and other "coverage" questions arise, demonstrate that the interruption to the renegotiation program may be substantial, and underline the need for a definite determination by this Court."

Apart from the renegotiation program, a decision of the question at hand has an important bearing upon the application of the Federal Declaratory Judgments Act to what could be termed "'jurisdictional" issues under consideration by an administrative body. Cf. *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752.

2. The decision below is in contravention of established principles of judicial administration. The judicial intervention into the administrative process, sanctioned by the ruling below, runs

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No. 29937; *States Steamship Co.* v. *Land et al.*, Civil No. 29938; *Luckenback Steamship Co., Inc.* v. *Land et al.*, Civil No. 28540.

[9] As the dissenting judge below pointed out (R. 68):

"The effect of the majority's decision will be to permit any party who is asked to renegotiate a contract to bring an immediate suit in court by alleging that his particular contract is not subject to the Act. On the filing of such a bill the renegotiation conferences must stop while the District Court makes an initial determination of the jurisdiction of the administrative agency."

Of some 200 renegotiation cases now pending in the Tax Court, approximately 130 (about 65%) raise an issue of coverage. Of these, some 110 cases (or about 55% of the total) raise issues of coverage other than those which the court below indicated (R. 60) might not be the subject of declaratory relief. See also Appendices A and B, *infra*, pp. 21–26.

counter to this Court's decisions deferring access to the courts until the authorized administrative task is completed. It is also inconsistent with the Congressional intention that issues such as that raised here should be decided exclusively in the Tax Court.

a. *Judicial intervention at this stage of the renegotiation proceeding is premature.*—The allegations of the complaint show that respondent has merely been requested to present certain information at an initial renegotiation conference, and has been notified of the opinion of the Board's counsel that certain of respondent's contracts are renegotiable. The Board has not determined that these contracts are subject to the Act,[10] or that any "excessive profits" have been realized under these or any other contracts of respondent. Even if the Board should ultimately decide both questions against respondent, such decision would merely be advisory to the Chairman of the Commission, who alone has authority to issue the final renegotiation order.[11]

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[10] The letter of May 23, 1944, from the Board's counsel to respondent's counsel (R. 43–44), merely recited the former's opinion (see R. 54) that respondent's arrangement with the Maritime Commission resulted in agreements subject to the Act, and was manifestly intended to show that there was a reasonable basis for holding an initial renegotiation conference. Nothing in the letter altered the invitation to respondent "to state reasons why you are not subject to renegotiation", contained in the original notice of November 26, 1943 (R. 31).

[11] See Appendix B, *infra*, pp. 24–30. The allegations in the complaint that petitioners "intend to and will" make "a

By granting a declaratory judgment at a preliminary stage of the administrative process, the court below ignored the well settled bar to the exercise of such jurisdiction—the absence of an actual or an immediately threatened invasion of legal rights.[12] It equally ignored the principle that the Declaratory Judgments Act does not authorize the Federal courts to issue "an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 324.[13]

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unilateral determination of alleged excess profits under the charter agreements" and "unlawfully withhold amounts due [respondent] from the United States" (R. 10) are "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774.

[12] *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Employers Group, etc.* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 735; *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. C. A. 5), certiorari denied June 18, 1945; *National War Labor Board* v. *United States Gypsum Co.*, 145 F. 2d 97 (App. D. C.), certiorari denied March 12, 1945. The "extensive inquisitorial investigation" thought by the court below to justify declaratory relief involves at most "expense and annoyance" which is "'part of the social burden of living under government'" and "not the sort of irreparable injury against which equity protects." *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 222, 221.

[13] See also *Maryland Casualty Co.* v. *Pacific Co.*, 312 U. S. 270, 273; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324–325.

No actual or threatened legal injury is to be derived from respondent's allegation (R. 11) that it will be subject to the penal sanctions of the Act for failure to supply the requested information. Even if the "request" of the Board for information (R. 29–32, 39–42) can be deemed a "demand" by the Chairman, "wilful" disregard of which is made punishable (Section 403 (c) of the Act), a court of equity will not on that account interfere where a refusal to comply is "based on an honest belief that the Act is not applicable." *California* v. *Latimer*, 305 U. S. 255, 260–261; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387. Moreover, under Title XIII of the Second War Powers Act (56 Stat. 185), made applicable by Section 403 (d) of the Renegotiation Act, authority is given to invoke the aid of federal courts to compel obedience to subpoenas; and even where judicial proceedings are thus instituted by the Government, the defendants could not obtain an original determination by the court of the question of coverage. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501.

b. *Relief in the Courts is Barred by Respondent's Failure to Avail Itself of the Statutory Procedure Provided by Congress for the Review of Renegotiation Proceedings.*—Section 403 (c) (2) of the Act, as amended by the Revenue Act of 1943, allowing any contractor "aggrieved by a determination of the Secretary * * * as to the existence of excessive profits * * * [to]

file a petition with the Tax Court of the United States for a redetermination thereof", expressly provides (Sec. 403 (c) (1)) that "Upon such filing such court shall have *exclusive jurisdiction*, by order, to finally determine the amount, if any, of such excessive profits * * *" (Italics supplied; see Appendix C, pp. 38–39, 37). Jurisdiction in the Tax Court was not only clearly intended to be exclusive,[14] but was intended by Congress to extend to "all questions of fact and law" (90 Cong. Rec. 1355).[15]

[14] The Tax Court remedy was added to the Renegotiation Act after its original enactment, to resolve the prevailing doubt as to the right of appeal to the courts (89 Cong. Rec. 9936), and the intention to confer "exclusive" jurisdiction upon the Court was repeatedly emphasized in the Committee Report (H. Rept. No. 871, 78th Cong., 1st Sess., pp. 76, 77, 84, 85). A recommendation by the House Naval Affairs Committee that the District Courts be given jurisdiction to review renegotiation determinations was rejected (H. Rep. 733, 78th Cong., 1st Sess., Investigation of the Progress of the War Effort, Report of the House Committee on Naval Affairs, pursuant to H. Res. 30, 78th Cong., 1st Sess., p. 34; 90 Cong. Rec. p. 1357), and instead a single forum, the Tax Court, was selected to assure, among other things, uniformity of decision and use of the Tax Court's expertness in profit questions (89 Cong. Rec. 9929).

[15] The authorization to the Tax Court to redetermine the "amount" of excessive profits necessarily includes questions concerning its jurisdiction to make such redetermination, including questions as to the "coverage" or application of the Act. Neither the Act nor its legislative history suggests that any special category of legal issues raised by the petition in the Tax Court was to be excluded from consideration by the Tax Court. Contractors seeking redress in the Tax Court have apparently assumed that all issues may there be decided. See p. 11, *supra*, n. 9.

In holding a declaratory judgment to be available although respondent has failed to resort to the Board, the Chairman, or the Tax Court, the court below disregarded "the long settled rule of judicial administration" requiring exhaustion of administrative remedies and the utilization of the judicial forum provided by Congress.[16] That such unprecedented intervention by a court can seriously interfere with sound administration is graphically illustrated in the instant case. The question which the court below directed the District Court to dispose of (whether the Red Sea Charters constituted "contracts with a 'Department'" within the meaning of the Act) was only one of three questions raised by respondent as objections to the application of the Act. That issue, far from being purely one of law, as the court below supposed (R. 60), involves a mixed question of law and fact of considerable complexity, requiring inquiry into the dealings and arrangements between the Commission and the respondent (see R. 8–9, 43). The hearing and determination of this question by the Chairman of the Commission and later by the Tax

[16] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51. Cf. *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Company* v. *Slattery*, 302 U. S. 300.

Court *de novo* on review[17] may involve presentation and consideration of the same data as would be pertinent to the other two issues of "coverage" raised by respondent in the court below—whether final payment under the contracts had been made prior to April 28, 1942, and whether they had been completed in a fiscal year expiring more than one year prior to the commencement of renegotiation proceedings. Yet the court below thought it proper to separate the first question from the others; and while conceding that the latter two may very well be matters "as to which Congress has committed the answer primarily to the Commission," it held that the first question was "jurisdictional and fundamental" and susceptible of resolution by declaratory judgment (R. 60). Such selection of one of several issues which an administrative agency would be required to consider before making a determination which Congress has explicitly entrusted to it, violates the sound precepts which stay the judicial hand until the entire administrative process is at an end (cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507–508). This is especially true since the Commission, in order to perform its "function * * * must draw inferences and make findings from the same conflicting materials" that the court below con-

[17] Since respondent appears to agree that certain of its contracts other than the Red Sea Charters are subject to the Act (R. 41), its standing as a "contractor" to seek review of renegotiation in the Tax Court would seem assured.

sidered in "anticipating and foreclosing" the administrative conclusion (see *Endicott Johnson Corp.* v. *Perkins, supra,* at 509).

c. *Apart from any Question of Jurisdiction to Entertain the Instant Suit, the Exercise of a Sound Discretion by the District Court Justified, if it did not Require, the Denial of a Declaratory Judgment.*—Ample warrant for the district court's decision to withhold declaratory relief is found not only in the essential prematurity of this action but in the danger of unduly delaying and interfering with the orderly administration of "the complex business of renegotiation" (R. 68). "Called upon to adjudicate what is essentially an equitable cause of action, the district court was as free as in any other suit in equity to grant or withhold the [declaratory] relief prayed, upon equitable grounds." *Great Lakes Co.* v. *Huffman,* 319 U. S. 293, 300; see also *Alabama State Federation of Labor, Local Union No. 103* v. *McAdory,* October Term, 1944, No. 588, decided June 11, 1945; *Brillhart* v. *Excess Insurance Co.,* 316 U. S. 491, 494.

Questions of "coverage" are constantly arising in the day to day administration of the Renegotiation Act, since the Act is replete with exceptions and exemptions affecting the "jurisdiction" of the renegotiation authorities. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Pur-*

poses, Principles and Interpretations, under the Renegotiation Act (March 31, 1943) pp. 9–16; see also p. 11, *supra*, n. 9, and Appendix A, *infra*, pp. 21–23. Hence, the attempt by a district court to resolve "coverage" issues at the outset of the renegotiation proceedings would threaten serious delay in the administration of the Act. Moreover, a renegotiation proceeding with respect to any one company normally extends to *all* of the company's contractual operations for a particular fiscal period,[18] so that the delay ensuing from a declaratory judgment action would affect not merely the contracts giving rise to the particular controversy but all the contracts involved in that renegotiation proceeding. And, as the dissent below noted, "it is naive to think that this device [the declaratory judgment suit] will not be used for purposes of delay" (R. 68).

In these circumstances, the directions of the court below to the district court to exercise jurisdiction would seem at the very least to constitute an abuse of discretion. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer". *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf.

[18] See Blough, *Renegotiation Standards and Practices* (1943), 10 Law and Contemp. Problems 276, at 277.

Harrisonville v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER 1945.

APPENDIX A

WAR CONTRACTS PRICE ADJUSTMENT BOARD
Washington 25, D. C., 12 September 1945.

Room 3D 573, The Pentagon,

ACTING SOLICITOR GENERAL,
Washington, D. C.

DEAR MR. JUDSON: At the request of your representatives I am submitting the following information relating to operations of renegotiation agencies under the Renegotiation Act. I am the general counsel of the War Contracts Price Adjustment Board and also legal adviser to the Chairman of the War Department Price Adjustment Board. While I am more familiar with particular cases that have been handled to conclusion by the War Department than by any of the several "Departments" as defined in the Act, nevertheless, I am generally familiar with the operations of those Departments. Based upon the experience of renegotiation agencies I can say that in a substantial proportion of all renegotiation proceedings questions arise as to whether the Act is applicable to the particular contractor or subcontractor or to receipts or accruals under one or more of the contracts or subcontracts involved in the proceedings. Of course in cases in which an agreement is entered with the contractor the issues are settled to the satisfaction of both

the Government and the contractor. These questions include, among others, the following:

(1) Whether certain of the receipts or accruals involved have been received or accrued under contracts with a "Department" within the meaning of the Act, or under subcontracts as defined in the Act.

(2) Whether final payment under certain of the contracts or subcontracts involved was made prior to April 28, 1942.

(3) Whether renegotiation proceedings were commenced within the time provided in the Act within which such proceedings must be commenced.

(4) Whether the aggregate of the amounts received or accrued in the contractor's fiscal year under the contracts or subcontracts to which the Act is applicable are under the fiscal year minimum provided in the Act.

The Renegotiation Act contains a termination date and is made applicable only to profits derived from contracts and subcontracts which are determined under regulations prescribed by the Board to be reasonably allocable to performance prior to the close of the termination date. In addition to the matters listed specifically above, it is to be expected that in certain of the cases handled by the renegotiation agencies, the contractor will differ with the renegotiation representatives as to the profits reasonably allocable to performance prior to the termination date.

Subject to the regulations of the War Contracts Price Adjustment Board, to the power of that Board to review unilateral determinations issued under delegated authority and to the power of

the Tax Court to redetermine excessive profits de novo, each Department in the administration of the Act determines questions of the applicability of the Act in issuing unilateral determinations under authority delegated by that Board.

Very truly yours,

W. W. Watts,
W. W. Watts,
Lt. Colonel, A. U. S.
General Counsel.

APPENDIX B

UNITED STATES MARITIME COMMISSION,
Washington, September 11, 1945.

THE ACTING SOLICITOR GENERAL,
Washington 25, D. C.

DEAR MR. JUDSON: At the request of your representatives, I am submitting the following information concerning the authority, practice and procedure of the United States Maritime Commission Price Adjustment Board.

Section 403 (f) of the Renegotiation Act of 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942) provides that "Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, * * * and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

Pursuant to that provision, the Chairman of the United States Maritime Commission (who under subsection (a) of the Act is a "Secretary" of a "Department") delegated certain powers to the Price Adjustment Board by Administrative Orders establishing and defining the authority of

the Board. Copies of these Administrative Orders are enclosed and made a part of this letter by reference.

Under the authority vested in the Board by these Administrative Orders, it has been the uniform practice of the Board to arrange a conference with the contractor after obtaining information and data, which after being analyzed indicate that "excessive profits" within the meaning of the Act may have been realized by the contractor from contracts with the United States or subcontracts thereunder, as defined in Section 403 of the Act. In the conference the Board attempts to reach an agreement with the contractor as to the extent to which, if at all, profits realized under such contract are excessive, and as to a satisfactory method for eliminating any "excessive profits." If no agreement with the contractor is reached, the Board makes a recommendation in Memorandum form to the Chairman of the Commission that he formally find that "excessive profits" have been realized in the amount believed by the Board to be excessive. In order that the Chairman of the Commission may reach an independent decision in the matter, the Board recites in the Memorandum all of the salient facts and financial data, as well as all other important considerations, upon which its recommendation is based. If any question is raised as to whether the Act applies to the particular contractor or to any of his contracts under review, the Board obtains an opinion from the Legal Division of the Commission, and uniformly makes reference, in the same Memorandum, to

such questions as well. These include such matters as whether a contract was with a "Department" within the meaning of the Act, whether final payment under the contract was made prior to April 28, 1942, whether the contract was completed or terminated in a fiscal year which closed more than one year before renegotiation proceedings were commenced, and similar questions as to application of the Act to the particular person or contract. It is also the Board's practice to draft and submit with its recommendation to the Chairman of the Commission, a proposed "unilateral order" for the Chairman's signature. If the recommendations and proposed order submitted by the Board are approved by the Chairman, the order is signed by him and issued as a unilateral order.

The Board, since its inception, has never issued, or asserted the authority to issue, a unilateral order on its own authority, and the Board has at no time understood the Administrative Orders referred to above as authorizing the Board to do more than to make recommendations to the Chairman of the Commission.

Sincerely,

John R. Paull,
JOHN R. PAULL,
Vice Chairman,
Price Adjustment Board.

Enclosures.

UNITED STATES MARITIME COMMISSION

WASHINGTON

Administrative Order No. 64

To All Employees of the United States Maritime Commission:

For the purposes of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, insofar as relates to renegotiation of contracts and subcontracts thereunder and for related purposes, there is hereby created a Board to be known as the "Price Adjustment Board of the Maritime Commission."

The Board shall consist of a Commissioner of the Maritime Commission to be designated by the Chairman of the Commission, a representative of the Division of Finance to be designated by the Director of Finance with the approval of the Maritime Commission, and a third member who shall be selected with the approval of the Chairman of the War Production Board as his representative. Additional members of the Board shall be appointed by the Commission from time to time should it appear advisable. The Commission members shall act as Chairman of the Price Adjustment Board.

The Board is hereby charged with responsibility for bringing about such review of contract and subcontract prices as it may deem to be desirable, renegotiating, or causing to be renegotiated, such contract prices when, in its judgment, such action is necessary or desirable, and making such rec-

ommendations to the Commission as may be appropriate to effectuate the results of such renegotiations.

The Board is also instructed whenever appropriate to function jointly with representatives or agencies of the Navy Department, the War Department, the War Production Board, and other Departments or Agencies of the Government.

To that end, the Board shall have the collaboration of the Commission's Purchase and Supply, Production, Finance, and Legal Divisions, and of such other officers and divisions of the Commission as may be appropriate, and in cases where it appears that costs or profits of contractors or subcontractors are, or may be excessive for any reason, shall initiate and be responsible for suitable action with a view to securing adjustments and refunds. The Board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Commission or by the Chairman of the Commission. The Construction Review and Analysis Section of the Division of Finance, in conjunction with the General Auditor of Construction, will act as fact-finding agency for the Price Adjustment Board, and will, upon the request of the Price Adjustment Board, conduct, or cause to be conducted, investigations into the cost and profits of any contracts or subcontracts in which the Commission is interested.

The Price Adjustment Board, the Construction Review and Analysis Section and the Commission's General Auditor of Construction are authorized to make use of the facilities of the Securities and Exchange Commission, Federal Trade

Commission, and other proper departments or agencies of the Government in securing and assembling information.

The Price Adjustment Board is also authorized to call upon the Cost Analysis Section of the War Production Board to conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, and through the Secretary of the Commission may request the Bureau of Internal Revenue to make available its services, with the approval of the Secretary of the Treasury, for the purpose of making examinations and determinations with respect to profits under such contracts or subcontracts. No audit shall be made pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board. This provision, however, does not apply to audits made in the normal course of the Commission's business otherwise than pursuant to such Executive Order.

All cost analysis reports and all information obtained from contractors, or otherwise by or for the Price Adjustment Board of the Maritime Commission, shall be available at all times to the corresponding Price Adjustment Boards of the War and Navy Departments and to the War Production Board.

Where contractors have contracts with either or both of the War and Navy Department, as well as with the Commission, the Price Adjustment Board of the Commission shall agree with the Price Adjustment Board or Boards of the Departments involved as to how and by whom negotiations shall be conducted.

The Board shall keep a written record of each action taken by it. The Board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

By Order of the United States Maritime Commission.

(Sgd.) W. C. PEET, Jr.,
Secretary.

MAY 5, 1942.

UNITED STATES MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
August 14, 1942.

By virtue of the authority vested in me by Section 403, Title 4, 6th supplement, National Defense Appropriation Act of 1942 (Public Law No. 528, 77th Congress, approved April 28, 1942), I hereby delegate to the Price Adjustment Board of the Maritime Commission, created by Administrative Order No. 64 of the United States Maritime Commission, dated May 5, 1942 and supplements thereto, all authority, duties and responsibilities therein set forth, provided, that renegotiation agreements shall not become final until approved by said Commission.

(s) E. S. Land,
E. S. LAND,
Chairman.

Delegation of Authority under subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Public 528, 77th Congress) approved April 28, 1942, as amended through July 1, 1943, herein referred to as the "Act"

to

Arthur G. Rydstrom, Commander U. S. N. R. for execution of clearance agreements

Whenever, as a result of renegotiation under the Act with a contractor or subcontractor assigned by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission, it shall have been found by at least two members of said Board that no excessive profits have been realized in the period or with respect to the contracts or subcontracts as to which such finding shall have been made, Arthur G. Rydstrom, Commander U. S. N. R., a member of said Board, is hereby authorized to enter into a final or other agreement with such contractor or subcontractor pursuant to subsection (c) (4) of the Act with full authority to execute the same on behalf of the Chairman of the Maritime Commission, representing the other Secretaries hereinafter referred to.

Provided, however,

(1) Nothing herein contained shall be construed as modifying the obligation of the Price Adjustment Board of the Maritime Commission and of the officer executing the final agreement

hereunder, to observe and follow the principles, policies and procedures as established from time to time by the Joint Price Adjustment Board;

(2) The agreements referred to herein commonly known as "Clearance Agreements" executed pursuant to this delegation of authority shall be on standard forms now in use by the Price Adjustment Board of the Maritime Commission and there shall be no substantial deviation therefrom without the prior approval of such Board;

(3) No contractor or subcontractor shall be required to inquire into the validity or regularity of any assignment by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission and the signature of the said Arthur G. Rydstrom on behalf of the Chairman of the Maritime Commission shall be conclusive evidence of his authority to execute such agreements on behalf of the Secretary of the various Departments to which the Act applies;

(4) For the purpose hereof the term "Department" includes within its meaning the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company or the Rubber Reserve Company, as the case may be, and the term "Secretary" includes within its meaning the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of

the War Shipping Administration and the Boards of Directors of the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company and the Rubber Reserve Company. The term "Joint Price Adjustment Board" includes within its meaning the Board established by the Secretaries by memorandum dated September 24, 1943.

(5) This delegation of authority to execute clearance agreements on behalf of the various Secretaries is made pursuant to a cross delegation of authority which became effective on October 20, 1943 pursuant to which the authority and discretion so delegated to one of the Secretaries may be exercised by such individuals or agencies within his Department to whom like authority and discretion in respect of contracts with his Department, and subcontracts thereunder, may have been or may thereafter be delegated.

(6) The authority hereby delegated shall be effective as of 12:01 A. M. February 1, 1944 and shall be retroactive to that time and may be revoked or modified at any time thereafter.

EMORY S. LAND,
Chairman of the United States Maritime Commission.

Dated as of February 1, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944